Appeal No. 2005AP508

Cir. Ct. Nos. 2003CV777
2004CV883

WISCONSIN COURT OF APPEALS
DISTRICT IV

ADAMS OUTDOOR ADVERTISING, LTD. d/b/a ADAMS OUTDOOR ADVERTISING OF MADISON,

PLAINTIFF-APPELLANT,

V.

CITY OF MADISON,

DEFENDANT-RESPONDENT.

FILED

DEC 14, 2005

Cornelia G. Clark
Clerk of Supreme Court

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Snyder, P.J., Nettesheim, J., and Daniel L. LaRocque, Reserve Judge.

Pursuant to WIS. STAT. RULE 809.61 (2003-04)[1] this court certifies the appeal in this case to the Wisconsin Supreme Court for its review and determination.

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

ISSUES

1. In the absence of a recent sale of the subject property and sales of other reasonably comparable properties, does the law require a taxing authority to use the "cost less depreciation" method instead of the "income" method when valuing an outdoor advertising sign for personal property tax purposes?

2. Should the appraisal methods used in eminent domain cases be recognized in personal property tax assessment cases?

3. Should the "inextricably intertwined" approach used in real estate tax assessment cases be recognized in personal property tax assessment cases?

4. Is a permit authorizing the location of an outdoor advertising sign an "intangible" within the meaning of WIS. STAT. § 70.112(1) and therefore an exempt factor for purposes of personal property tax assessment?

5. Does the Uniformity Clause, article VIII, section 1 of the Wisconsin Constitution and the language of ***State ex rel. Baker Manufacturing Co. v. City of Evansville***, 261 Wis. 599, 53 N.W.2d 795 (1952), require that similar property be assessed under the same methodology or merely require that the fraction of the value taxed be the same?

BACKGROUND

This case presents a personal property tax valuation dispute between the City of Madison and Adams Outdoor Advertising, Ltd. (Adams). At issue is the proper methodology for assessing Adams' outdoor advertising signs. While the parties sharply dispute that question, the background facts of this case are not

in dispute and are documented in the circuit court's written opinion. We borrow liberally from that opinion in our recitation of the facts.

Adams is in the business of constructing, erecting and displaying outdoor billboard signs. Adams leases the lands upon which its signs are displayed. Before a sign can be displayed, Adams must obtain a permit from the City authorizing the display location. Adams' general manager testified that the permitting process is difficult and is the most critical component of a sign's value.

In the late 1980s, the City began placing limits on the number of allowable outdoor signs, resulting in a loss of some of Adams' sign sites. Consequently, Adams commenced an inverse condemnation action against the City in 1994. In support of its claimed damages, Adams procured the "Ruppert appraisal" which estimated the value of Adams' signs at $5,000,000 using the "income" approach.[2] Prior to the "Ruppert appraisal," the City had assessed Adams' signs using the "cost less depreciation" approach. This resulted in assessments in the amounts of $2,000,000, $1,404,200 and $1,346,500 for the years 1991, 1992 and 1993, respectively. For 1994, however, the City's assessment of Adams' signs increased to $3,032,000 based, in part, on the City's adoption of the "Ruppert appraisal."

[2] The "income" method is not a means of taxing business income. Rather, the assessor uses this method to convert the future benefits likely to be derived from the item being appraised into an estimate of present market value. Under this method, the assessor first determines the net annual income of the property. This figure is computed by deducting the estimated operating expenses from the property's gross income. The assessor then selects a capitalization rate by considering the discount and recapture rates suitable for such an investment as well as the applicable effective tax rate. Finally, the assessor applies a capitalization rate to the net annual income to yield the present value of the income stream over the life of the property. ***Waste Mgmt. of Wis., Inc. v. Kenosha County Bd. of Review***, 184 Wis. 2d 541, 561, 516 N.W.2d 695 (1994).

The taxable years at issue in this case are 2002 and 2003. For those years, the City assessed values of $6,022,400 and $5,858,000, respectively, to Adams' signs.[3] Adams timely objected to both of these assessments, contending that the values were $401,984 and $337,912 respectively. Adams paid the taxes under protest, and requested and received hearings before the City's Board of Review. In each instance, the Board of Review affirmed the assessments. The City subsequently rejected Adams' claims for excessive assessments.

Adams then commenced the instant actions pursuant to WIS. STAT. § 74.37, claiming excessive assessments for the taxable years 2002 and 2003. Specifically, Adams argued that the City should have used the "comparable sales" approach, the second tier of appraisal hierarchy, instead of the income method under the third tier of the hierarchy. *See* ***State ex rel. Markarian v. City of Cudahy***, 45 Wis. 2d 683, 686, 173 N.W.2d 627 (1970). Alternatively, Adams contended that if the third tier of the hierarchy was proper: (1) the City should have used the "cost less depreciation" method instead of the income method, and (2) if the income method was appropriate, it violated the Uniformity Clause, article VIII, section 1 of the Wisconsin Constitution.

The circuit court consolidated the two actions. The parties presented the circuit court with a "Summary of Undisputed Facts" that set out some of the history we have already recited and which set the stage for the parties' competing expert testimony at the ensuing trial.

[3] The City's original 2002 valuation was $5,815,900. However, following Adams' objection, the City's Board of Assessors increased the valuation to $6,022,400. The City's original 2003 valuation was $6,625,000, but the personal property tax bill for that year was based on a lesser valuation of $5,858,000.

The City's chief assessor, Michael Kurth, testified to the well-established hierarchy of property tax assessment: (1) the assessment must be based on a recent arm's length sale of the subject property; (2) if no such sale exists, the assessment must be based on recent sales of comparable properties; and (3) if no such recent sales exist, the assessment may be based on a variety of other factors, including costs, depreciation and income. ***Markarian***, 45 Wis. 2d at 686; ***State ex rel. Kesselman v. Board of Review for Sturtevant***, 133 Wis. 2d 122, 128-29, 395 N.W.2d 745 (Ct. App. 1986).

Because there was no recent sale of the subject property and because Kurth concluded that sales of other properties were not "reasonably comparable," Kurth utilized the income approach. Under this method, Kurth first determined the total sign income and then subtracted: (1) the value of the leasehold interest, (2) the income attributed to the advertising portion of the business, and (3) the operating expenses of the business. This produced a net operating income to which Kurth then applied a capitalization rate of fourteen percent producing the valuations.[4]

Kurth rejected the "cost less depreciation" method under the third tier of the valuation hierarchy. He reasoned that the value of a sign represents more than just "its nuts and bolts value." Instead, Kurth contended that the "location of the sign is of paramount importance in outdoor advertising" and "it is virtually impossible to separate location from the structure." By considering the

[4] The circuit court's opinion, citing NICHOLS ON EMINENT DOMAIN, § 23.04[4], defines "capitalization" as "the conversion of a projected, future income stream to present value by dividing the periodic income by a capitalization rate that would represent a return to the owner." Mark S. Ulmer, *Condemnation of Billboard Interests, in* 8A NICHOLS ON EMINENT DOMAIN (1997; 1st rev. 1999; 2nd rev. 2004).

location of the signs, Kurth implicitly factored the issuance of the sign permits into his assessment methodology. Kurth reasoned, "The sign structure and appropriate rights associated with the sign structure are inextricably intertwined and cannot be properly valued using the cost approach."

Adams responded with the testimony of Rodolfo Aguilar, an appraiser, architect and civil engineer. Aguilar appraised Adams' signs using the "cost less depreciation" approach, which simply estimated the cost to reproduce or replace the signs, and then deducted the depreciation due to physical deterioration, functional obsolescence and external obsolescence. Aguilar acknowledged that the value of the permit could be quantified, but contended that the permit should not be taxed because it was an "intangible"—an item without "physical presence." This resulted in a total valuation of Adams' signs by Aguilar in the amount of $1,565,100. Adams' other expert witnesses, Don Sutte and Mark Ulmer, agreed with Aguilar that the permit authorizing the location of a sign was not a proper factor when appraising an outdoor sign for purposes of personal property tax.

At the outset of its written decision, the circuit court stated, "The parties acknowledge that there is no definitive Wisconsin authority directing the use of one particular method to assess billboards." The court acknowledged the

Vivid line of cases dealing with billboards, but correctly noted that those cases involved valuations for purposes of eminent domain, not personal property taxes.[5]

Addressing the issue without the benefit of any directly controlling Wisconsin case law, the circuit court concluded that the purpose of the valuation should not "drive the valuation method." Instead, the court said:

> The goal of achieving fair market value is the same for each and the assessor must utilize the method according to the valuation hierarchy for which reliable data exists. Under the reasoning of ***Vivid II***, moreover, the court must insure that all taxable value is assessed and non-taxable value is not.

The circuit court found collateral support for its ruling in ***State ex rel. N/S Associates v. Board of Review of Greendale***, 164 Wis. 2d 31, 473 N.W.2d 554 (Ct. App. 1991), acknowledging, however, that the case involved an assessment for purposes of a real estate tax, not a personal property tax.

In ***N/S Associates***, the court of appeals considered whether the assessor properly considered the "going concern" nature of a shopping mall, instead of limiting the assessment to the cost of replacement or reconstruction of the mall. ***Id.*** at 52-53. The court of appeals said, "The key of the analysis is whether the value is appended to the property, and is thus transferable with the

[5] In ***Vivid, Inc. v. Fiedler***, 182 Wis. 2d 71, 73, 512 N.W.2d 771 (1994) (***Vivid I***), the supreme court held that an owner of outdoor signs on leased sites was entitled to "just compensation" under the law of eminent domain for the loss of the signs due to highway improvements. ***Id***. at 73. In ***Vivid, Inc. v. Fiedler***, 219 Wis. 2d 764, 580 N.W.2d 644 (1998) (***Vivid II***), a majority of concurring justices held that "just compensation" meant compensation "only for the value of the property, not for the value of the business." ***Id***. at 797. But, as the circuit court noted here, the supreme court's decision in ***Vivid II*** did not address the differences between a valuation for eminent domain purposes as compared to a valuation for property tax purposes, a matter which the court of appeals had addressed in the unpublished decision under review.

property, or whether it is, in effect, independent of the property so that the value either stays with the seller or dissipates on sale." ***Id***. at 54. The court concluded that the mall's *raison d'etre*—the leasing of space to tenants and related activities—was a transferable value that was "inextricably intertwined" with the land, rendering it a valid component of the property's value.[6] ***Id***. at 55.

In the final analysis, the circuit court concluded:

> A billboard does not generate income sitting in a warehouse; its value is a function of its permit and its location. That income-generating capacity is inextricably intertwined with the billboard and its value must be captured if, as Wisconsin law requires, the property is to be assessed at its full market value.

The circuit court also rejected Adams' argument under the Uniformity Clause, article VIII, section I of the Wisconsin Constitution.

Adams appeals, renewing the arguments it made in the circuit court.

DISCUSSION

1. Introduction

We begin our discussion by noting some basic principles of property tax law and procedure that the parties do not dispute.

[6] The circuit court also noted the supreme court's holdings to the same effect in ***Waste Management***, 184 Wis. 2d at 563, and ***ABKA Ltd. Partnership v. Board of Review of Fontana-on-Geneva Lake***, 231 Wis. 2d 328, 344, 603 N.W.2d 217 (1999). However, as with ***N/S Associates***, the circuit court noted that those also were real estate tax cases, not personal property tax cases. ***State ex rel. N/S Associates v. Board of Review of Greendale***, 164 Wis. 2d 31, 473 N.W.2d 554 (Ct. App. 1991).

First, Adams' action is brought pursuant to WIS. STAT. § 74.37, which allows a taxpayer to recover "that amount of general property tax imposed because the assessment of property was excessive." This type of proceeding is not a certiorari review in which the circuit court is limited to a review of the record made before a board of assessment. ***Bloomer Hous. Ltd. P'ship v. City of Bloomer***, 2002 WI App 252, ¶11, 257 Wis. 2d 883, 653 N.W.2d 309. Instead, an "excessive assessment" action allows the circuit court to proceed without regard to any prior determination. ***Id***. In addition, the circuit court is required to give only presumptive weight to the taxing authority's assessment, which means that the assessment is presumed correct if the challenging party does not present significant contrary evidence. ***Id***. Finally, the circuit court may hear new evidence in this type of proceeding. ***Id***.

Second, WIS. STAT. § 70.01 authorizes the taxation of "general property" and embraces both real estate taxes and personal property taxes. WISCONSIN STAT. § 70.04 defines "personal property" as including "all goods, wares, merchandise, chattels, and effects, of any nature or description, having any real or marketable value, and not included in the term 'real property,' as defined in s. 70.03." WISCONSIN STAT. § 70.34 requires that "[a]ll articles of personal property shall, as far as practicable, be valued by the assessor upon actual view at their *true cash value* …." (Emphasis added.) WISCONSIN STAT. § 70.112 recites property that is exempt from general property taxes, and includes at subsec. (1) "[a]ll intangible personal property such as credit, checks, share drafts, other drafts, notes, bonds, stocks and other written instruments."

Third, as we have already noted, the law establishes a hierarchy of valuation methods for purposes of property tax assessment:

> The "best information" of fair market value is a sale of the property or, if there has been no such sale, then sales of reasonably comparable property. In the absence of such sales, the assessor may consider all the factors collectively which have a bearing on the value of the property in order to determine its fair market value. Among these factors are costs, depreciation, replacement value, income, industrial conditions, location and occupancy, sales of like property, book value, amount of insurance carried, value asserted in a prospectus and appraisals procured by the owner.

Kesselman, 133 Wis. 2d at 128-29 (citations omitted).[7]

With these principles in mind, we turn to the core dispute between the parties.

2. "Cost Less Depreciation" Method Versus "Income" Method

The circuit court and the parties acknowledge that there is no Wisconsin case law addressing how a billboard sign is to be valued for purposes of personal property tax assessment. More specifically, there is no controlling authority as to whether the "cost less depreciation" method or the "income"

[7] As noted, one of Adams' arguments is that Kurth, the City's chief assessor, failed to consider evidence of comparable sales. In support, Adams cites to isolated deposition responses by Kurth acknowledging that he did not consider such sales. This argument, however, does not represent the full state of the record. In his written report to the circuit court, Kurth stated that he had considered other sales, but deemed them not "reasonably comparable" for a variety of reasons: (1) they were outdated, (2) the sales information did not include the details of the sign types making it difficult to determine true comparability, (3) the sales involved a small number of sign faces whereas the Adams' signs numbered over two hundred faces, and (4) the sales information did not provide reliable data upon which to calculate the gross income multiplier. The circuit court expressly referenced Kurth's written report in rejecting Adams' argument that Kurth had failed to consider comparable sales.

Thus, contrary to Adams' argument, this is not a case where the assessor failed to consider other sales. In fact, the assessor considered such sales but deemed them not "reasonably comparable." Adams makes no argument against this determination by the assessor, nor does Adams argue against the circuit court's adoption of this determination. If we are called upon to address this argument, we candidly state that we will reject it.

method is the proper method under the third tier of appraisal methodology. Thus, the circuit court wrote on a blank page.

Although ruling without the benefit of any Wisconsin precedent, the circuit court's reasoning approving the City's income approach has a ring of common sense. The court correctly stated that WIS. STAT. § 70.34 requires personal property to be valued at "true cash value." The court also correctly equated this rule with that governing the valuation of real property set out in WIS. STAT. § 70.32(1), which requires valuation "at the full value which could ordinarily be obtained therefor at private sale." The supreme court has held that despite the difference in language between these two statutes, they "describe substantially the same method of valuation." ***State ex rel. Mitchell Aero, Inc. v. Board of Review of Milwaukee***, 74 Wis. 2d 268, 277, 246 N.W.2d 521 (1976). That method "generally has been to assess both personal and real property on the basis of its fair market value[,] *i.e.,* the amount it will sell for upon arm's-length negotiation in the open market, between an owner willing but not obliged to sell, and a buyer willing but not obliged to buy." ***Id***. *See also* ***State ex rel. Keane v. Board of Review of Milwaukee***, 99 Wis. 2d 584, 588, 299 N.W.2d 638 (Ct. App. 1980).

Given that goal, the circuit court's approval of the assessor's consideration of the permit as a relevant factor in the valuation process seems reasonable. As the court observed, "A billboard does not generate income sitting in a warehouse; its value is a function of its permit and its location." The obvious purpose of an outdoor sign is for public display, hopefully in a desirable location.[8]

[8] Hence the phrase, "Location, location, location."

And that hope rests on the granting of a permit. The circuit court aptly noted the testimony of Adams' general manager that the permit is the most critical component of a sign's value. Against that backdrop, the court applied the "inextricably intertwined" approach used in the real estate assessment cases by the court of appeals in ***N/S Associates*** and the supreme court in ***Waste Management of Wisconsin, Inc. v. Kenosha County Board of Review***, 184 Wis. 2d 541, 563, 516 N.W.2d 695 (1994), and ***ABKA Ltd. Partnership v. Board of Review of Fontana-on-Geneva Lake***, 231 Wis. 2d 328, 344, 603 N.W.2d 217 (1999). The circuit court concluded that the permit, which allows the location of the sign and which triggers the business value of the sign, was "inextricably intertwined" with the true value of the sign.

Despite the tempting logic of the circuit court's ruling, formidable authority rests on the other side of the issue. Aguilar, an appraiser and one of Adams' experts, testified that standard appraisal practice draws a distinction between valuations for purposes of eminent domain and personal property tax assessments. While a permit is a valid factor for eminent domain valuation, Aguilar stated that a permit is an "intangible" lacking "physical presence" for purposes of property tax assessment. As such, Aguilar valued Adams' outdoor signs using the "cost less depreciation" method.

Attorney Mark Ulmer, another of Adams' experts, echoed Aguilar's testimony, stating that although fair market value is the commonly used measure in both eminent domain and tax assessment:

> The property at issue differs between these two situations. In an eminent domain proceeding, the goal is to ascertain the fair market value of the leasehold improved with the billboard. In tax assessment, on the other hand, the goal is the determination of the fair market value of the billboard

> alone[,] the leasehold and intangible invested rights being assessed separately through ad valorem real estate taxes.

Ulmer carries significant credentials, having authored the chapter titled "Condemnation of Billboard Interests" in NICHOLS ON EMINENT DOMAIN, a respected and often-cited eminent domain treatise.[9] Mark S. Ulmer, *Condemnation of Billboard Interests, in* 8A NICHOLS ON EMINENT DOMAIN ch. 23 (1997; 1st rev. 1999; 2nd rev. 2004).

In addition, Adams points to three opinions by the Wisconsin Department of Revenue holding that sign structures are to be valued utilizing a cost, not an income, approach. *See* Wis. DOR Case No. 91-77-15, ***Universal Outdoor, Inc. v. Town of Yorkville,*** Racine County, Wisconsin; Wis. DOR Case No. 99-77-06, ***Universal Outdoor, Inc. v. Town of Sommers***, Kenosha County, Wisconsin; Wis. DOR Case No. 91-77-05, ***Universal Outdoor, Inc. v. Town of Bristol***, Kenosha County, Wisconsin.

Adams additionally cites to cases from other jurisdictions in support of its argument. Adams places particular emphasis on ***City of Auburn Hills v. Gannett Outdoor Co. of Michigan***, Nos. 188460 and 188461, 1997 WL 402500, (Mich. Tax Trib. Apr. 24, 1997), where the assessor also used the income approach, employing a gross income multiplier. ***Id***. at *1. Like Wisconsin, Michigan law measures the value of personal property in terms of "true cash value" and equates that concept with "fair market value." ***Id.*** The Tribunal rejected the assessor's use of the income approach for a variety of reasons,

[9] Adams also presented the testimony of a further expert, Don Sutte. However, the circuit court appears to have rejected Sutte's testimony on credibility grounds.

including a concern that the income approach "may include more than the value of the billboards alone." ***Id***.[10]

Finally, Adams' brief represents that no other taxing authority in Wisconsin, save the cities of Madison and Sun Prairie, uses the income approach when assessing outdoor signs.[11]

3. Constitutional Challenge Under the Uniformity Clause

Article VIII, section 1 of the Wisconsin Constitution states: "The rule of taxation shall be uniform …. Taxes shall be levied upon such property … as the legislature shall prescribe." Adams contends that the City's use of the income approach for its signs, but not for other similar commercial properties, violates this Uniformity Clause.

The circuit court disagreed. The court noted the supreme court's holding in ***Noah's Ark Family Park v. Board of Review of Lake Delton***, 216

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[10] In particular, the Tribunal stated:

> [B]illboard rentals may include payment for incorporal benefits of advertising, the accumulative benefit of owning multiple sign locations for a coordinated advertising campaign … with local or national market coverage, charges for expenses of operating the business of advertising, the expenses of owning and maintaining operating equipment, sales commissions, management and employee wages, accounting and office overhead, advertising artwork, land lease expense, and business profit.

City of Auburn Hills v. Gannett Outdoor Co. of Mich., Nos. 188460 and 188461, 1997 WL 402500, (Mich. Tax Trib. Apr. 24, 1997).

[11] Adams states that the City of Sun Prairie adopted the income method after the City of Madison adopted the method. Adams also represents that the signs of Lamar Outdoor Advertising, an outdoor advertising company that operates in forty-eight states, are assessed under the income approach in only one jurisdiction—the City of Madison.

Wis. 2d 387, 392, 573 N.W.2d 852 (1998), that the Uniformity Clause bars an arbitrary method of assessment based on improper consideration. In ***Noah's Ark***, the supreme court held that the assessment was arbitrary because it was based on "a mistaken view of proper assessment practice." ***Id***. at 394. Here, unlike ***Noah's Ark***, the circuit court concluded that the City's income approach was not based upon any improper consideration. This suggests that the resolution of Adams' constitutional claim might have to await the threshold judicial decision as to whether the City's income approach passes muster. That, of course, is the paramount question we certify to the Wisconsin Supreme Court.

In addition, the circuit court noted its holding that the assessor had rejected other sales as not "reasonably comparable." From that, the court reasoned that Adams had failed to demonstrate that the City's use of the income approach was in violation of the Uniformity Clause. In support, the court cited ***Baker Manufacturing Co.***, a case which addressed a Uniformity Clause challenge. There, the supreme court said:

> The methods of determining true, current value necessarily differ in the absence of significant sales, but when once the true value is arrived at, each dollar's worth of one sort of property is liable for exactly the same tax as a dollar's worth of any other sort of property, and to assess real property at a different fraction of the value than personalty is error.

Baker Mfg. Co., 261 Wis. at 609. The circuit court apparently read this language to say that the use of different methods of valuing similar property is not per se unconstitutional so long as the fraction of value taxed is the same. This case offers the supreme court the opportunity to clarify whether this is a correct interpretation of this language.

CONCLUSION

As the circuit court and the parties correctly observed, there is no direct controlling authority on the question of whether the "income" method or the "cost less depreciation" method is a permissible method for valuing personal property for purposes of the personal property tax when there is no recent sale of the subject property or reasonably comparable sales of other properties. We certify this issue to the Wisconsin Supreme Court. As subsets of that issue, this case presents additional unanswered questions: (1) whether the appraisal methods used in eminent domain cases can apply when assessing property for purposes of the personal property tax, (2) whether the "inextricably intertwined" approach used in real estate tax assessment cases should apply in personal property tax assessment cases, and (3) whether consideration of a permit authorizing the location of an outdoor sign is an "intangible" under WIS. STAT. § 70.112(1) and therefore not a proper factor for consideration when assessing an outdoor sign for personal property tax purposes.

Also, on a constitutional level, this case offers the supreme court an opportunity to clarify if the court's language in ***Baker Manufacturing Co.*** requires that similar property must be assessed under the same method or merely requires that the fraction of the value taxed be the same regardless of the assessment methods employed.

Finally, it appears the City of Madison is on the cutting edge of this issue in Wisconsin, and perhaps nationally, suggesting that additional taxing authorities may choose to assess outdoor advertising signs if the method receives judicial approval. That further augurs for a supreme court ruling on the question.

We respectfully ask the Wisconsin Supreme Court to accept jurisdiction over this appeal.